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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK and SHERRY R. FRINK,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a corporate agent used by a partnership to hold legal title to the partnership's property -- as required by lenders to comply with State usury laws -- is taxable on income the agent receives on behalf of its principal (but earned exclusively by the partnership/principal), solely because the agent is owned by some of the partners.

The United States Tax Court and the Sixth and Federal Circuits read this Court's decision in National Carbide Corporation v. Commissioner, 336 U.S. 422 (1949), as saying no. The Fourth and Fifth Circuits read the same decision as saying yes.

STATEMENT OF INTERESTED PARTIES

STEPHEN G. ABSHIRE and MARY B. ABSHIRE
Lafayette, Louisiana

JANET F. BAUM, Formerly JANET F. NORTON
Baton Rouge, Louisiana

FREM F. BOUSTANY, SR. and
BEATRICE J. BOUSTANY
Lafayette, Louisiana

FREM F. BOUSTANY, JR. and
ANGELL F. BOUSTANY
Lafayette, Louisiana

DAVID R. CARPENTER and
ERICA J. CARPENTER
Baton Rouge, Louisiana

JOE B. CLARKE, JR.
Lafayette, Louisiana

COMPREHENSIVE PLANNING ASSOCIATES, INC.
Mandeville, Louisiana

PHOPHO COSMAS
San Rafael, California

DONALD G. EDGERTON
Alexandria, Louisiana

WILLIAM G. EMERSON
Carencro, Louisiana

TUNCAY ERTAN and NONA G. ERTAN
Alexandria, Louisiana

KENNETH G. FINK, JR. and CAROL FINK
Denham Springs, Louisiana

SIDNEY FREDERICK and IRENE S. FREDERICK
Lafayette, Louisiana

JOSEPH W. GAITREAU
Baton Rouge, Louisiana

GAYLE L. GALLOWAY
Lafayette, Louisiana

JAMES M. GEORGE and MARGARET C. GEORGE
Lumberton, Mississippi

M. L. GODLEY
Lecompte, Louisiana

HOLLIS O. GRAHAM and IDA G. GRAHAM
Ruston, Louisiana

JAMES D. HARDWICK
Alexandria, Louisiana

JAMES W. HARRINGTON
Morgan City, Louisiana

LAKEWAY MANAGEMENT COMPANY
Metairie, Louisiana

FRANK E. LANIER
Hammond, Louisiana

LASSCO, INC.
Mandeville, Louisiana

HARRY R. LAYNE and JANET J. LAYNE
Covington, Louisiana

DONALD L. McCOLLISTER and
SANDRA M. McCOLLISTER
Baton Rouge, Louisiana

ESTATE OF LEE McCORMICK
Monroe, Louisiana

LYNN ALAN MEADOWS
New Iberia, Louisiana

MID-STATE SAND & GRAVEL CO., INC.
Alexandria, Louisiana

FRANCIS W. MORIARTY
Lafayette, Louisiana

ESTATE OF COMAN S. NORTON, Deceased,
Caroline Norton,
Testamentary Executrix
Baton Rouge, Louisiana

CHARLES A. PRINCE and RUTH O. PRINCE
Alexandria, Louisiana

ROBERT A. RAYFORD and IRIS B. RAYFORD
Pineville, Louisiana

JUDGE EDMUND REGGIE
Crowley, Louisiana

DELLA ROBIN
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PETRO J. ROUSSOS
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CHARLES L. SCOTT
Jackson, Mississippi

ROLAND M. TOUPS and KATHRYN B. TOUPS
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DARRYL TSCHIRN
New Orleans, Louisiana

NATHAN L. WISE
Jackson, Mississippi

GEORGE A. WOLCOTT and DOROTHY WOLCOTT
Houston, Texas

JOHN C. and DESPINA COSMAS YEMELOS
Manalapan, Florida

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

GARY R. FRINK and SHERRY R. FRINK,
Petitioners,

v.

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioners, Gary R. Frink and Sherry R. Frink, respectfully pray that this court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceedings on August 8, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 798 F.2d 106, and is reprinted in the Appendix hereto as Appendix A.

The Memorandum Decision of the United States Tax Court has been unofficially reported at 49 T.C.M. (CCH) 386 (1984), and has been reprinted herein as Appendix F.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was issued on August 8, 1986, (Appendix A) and Petitioner timely sought rehearing. The Petition for Rehearing was denied on September 16, 1986 (Appendix B). On December 12, 1986, Chief Justice Rehnquist ordered that the time for filing this petition for writ of certiorari be extended to and include January 14, 1987.

The Jurisdiction of this Court to review the Judgment of the Fourth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

COMPANION CASES

A petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit captioned George v. Commissioner of Internal Revenue, filed on even date hereof, arises from the same matter that gives rise to this petition. Petitioners here and petitioners in the George case (Appendix C) were all petitioners in Frink, et al. v. Commissioner decided by the United States Tax Court on December 27, 1984, (Appendix F) from which appeals were taken to the Fourth Circuit (in which petitioners here reside) and the Fifth Circuit (in which the George petitioners reside).

If certiorari is granted in this case, it should be granted in the George case also, and the cases should be consolidated.

The United States Court of Appeals for the Sixth Circuit in Bollinger v. Commissioner, No. 85-1825, Decided December 2, 1986, (Appendix E) on indistinguishable facts, came to a clearly opposite decision from Frink and George.

The trial attorney for the Department of Justice has informally advised that the government will not file a petition for rehearing in Bollinger and, further, that the Solicitor General has not yet reached a decision as to whether a petition for a writ of certiorari will be filed in this Court in Bollinger, or whether he will acquiesce to the petition for writs in Frink and George.

STATEMENT OF THE CASE

Petitioners, Gary and Sherry Frink, are limited partners in Biloxi Hilton Properties Partnership (BHPP), a Louisiana partnership organized to construct and operate the Biloxi Hilton Hotel on the Mississippi Gulf Coast.

I. The Agency Relationship.

In 1972, The Casren Development Company (Casren) (Louisiana partnership) was organized, with John C. Yemelos (Yemelos) as 80% owner and his mother-in-law, Phopho Cosmas (Cosmas) as 20%

owner, for the purpose of developing the Biloxi Hilton Hotel. (App. F, Page 72a.) At that time, Mississippi usury laws held that loans to non-corporate borrowers at interest rates in excess of six percent were usurious. The Casren Partnership wished to borrow $6.7 million from Mortgage Investors of Washington (MIW), and was willing to pay more than six percent interest. However, to do that without usury, the loan would have to be made to a corporation. (App. F, Page 76a.)

With the concurrence of the Casren partners, MIW's attorney suggested that a Mississippi corporation C. M. Conduit, Inc. (Conduit) owned by the attorney would, for a fee of $1,000, act as a corporate nominee to hold record title. Just before closing, MIW rejected the proffered agent because it had a problem with the corporate name. (App. F, Page 78a.) To resolve this last minute problem, an alternative nominee, Argo Hotels, Inc. (Argo), a preexisting dormant Louisiana corporation owned 50% by Yemelos and 50% by his wife, was chosen to act as corporate agent for Casren.

(App. F, Pages 75a-78a.) As will be seen, the fact that Yemelos was a substantial owner both of Casren and Argo was later to cause the problem giving rise to the question presented herein. (See page i hereof.)

At all times, all parties to the transaction, including but not limited to partners, interim lenders, permanent lenders, contractors, franchisors, and all counsel for each of these parties were aware that Argo was acting as corporate nominee for the partnership. (App. F, Pages 81a-83a.) At all times, Argo's sole purpose was to hold record title for Casren. Argo had no bank account, received no capital contributions, and had no employees. (App. F, Page 96a.)

In 1975, the Casren partnership converted itself into Biloxi Hilton Properties Partnership (a partnership in commendam) (BHPP), with Yemelos and Cosmas as general partners, and brought in a number of limited partners, including the petitioners. (App. F, Pages 87a-88a.) In connection with this change, Argo and BHPP formally made clear that

although record title to the hotel property had been placed in its name by Casren in October, 1973, all parties recognized that the underlying ownership of the property had been converted from Casren to BHPP. (App. F, Page 88a.)

Yemelos initially owned 68.9% interest in BHPP, but subsequent admissions to the BHPP partnership reduced his interest to 53.94%. (App. F, Pages 89a and 92a.) In 1977, the need for a corporate nominee ended, and Argo conveyed to BHPP its record title to the hotel.

II. Proceedings Below.

On its tax returns for 1975 through 1977, BHPP reported losses totaling $4 million from the construction and operation of the Biloxi Hilton Hotel, and the thirty limited partners of BHPP deducted their distributive shares of these losses on their individual returns. (App. F, Page 98a.) The Commissioner disallowed these deductions on the grounds that the losses were properly attributable to Argo and not BHPP.

On petition, the Tax Court disagreed with the Commissioner and found as a fact that Argo served as the corporate agent of Casren/BHPP for the primary purpose of holding record title, so that the venture could get a loan without running afoul of the Mississippi usury laws. (App. F, Page 99a.) Argo's losses were therefore the losses of BHPP. Accordingly, the limited partners of BHPP could deduct them. (App. F, Page 99a.)

The Tax Court decision covered twenty consolidated dockets. Appropriate appeal with respect to eighteen of them was taken to the United States Court of Appeals for the Fifth Circuit in George v. Commissioner, 803 F.2d 144 (1986) (Appendix C). Appropriate appeal of the remaining two taxpayers (petitioners here) was properly taken to the Circuit of their domicile, the United States Court of Appeals for the Fourth Circuit in Frink v. Commissioner, 798 F.2d 106 (1986) (Appendix A).

Both Courts of Appeals accepted the finding of the Tax Court that Argo acted

as corporate agent for BHPP and not in its own behalf. Both the Fourth Circuit (Frink) and the Fifth Circuit (George), however, following their earlier decisions in Ourisman[1] and Roccaforte[2], respectively, reversed the Tax Court. Both decisions rested on the Courts' interpretations of this Court's decision in National Carbide Corporation v. Commissioner, 336 U.S. 422 (1949), which lays down rules for determining when a corporation is an independent, business-doing, income-earning entity, and therefore taxable on its income; and when the corporation is a mere agent, whose receipt of income on behalf of the principal is not taxable to the corporation. The relevant National Carbide language is as follows:

> What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. [1] Whether

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1. Ourisman v. Commissioner, 82 T.C. 171 (1984), rev'd 760 F.2d 541 (4th Cir. 1985).

2. Roccaforte v. Commissioner, 77 T.C. 263 (1981), rev'd 708 F.2d 986 (5th Cir. 1983).

the corporation operates in the name and for the account of its principal, [2] binds the principal by its actions, [3] transmits money received to the principal, and [4] whether the receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. [5] If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [6] Its business purpose must be the carrying on of the normal duties of an agent. 336 U.S. 422 (1949) at 437 (Emphasis added.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE 1986 DECISION OF THE SIXTH CIRCUIT IN BOLLINGER AND THE 1985 DECISION OF THE FEDERAL CIRCUIT IN RAPHAN

A. THE PROBLEM

Yemelos and Cosmas, as general partners of BHPP, together with their limited partners chose the partnership form of conducting the business of building and operating the Biloxi Hilton Hotel. As with most businesses, it was necessary for them to borrow the funds needed to carry out this venture. However, market interest rates had risen above the six percent ceiling set forth in the Mississippi usury statute, and no financing was available at a six percent rate. Consequently, if any individual or partnership wanted to borrow money, it was necessary to do so through a corporate nominee, which would not be subject to the State's usury laws. This is a commonly used formality. (App. F, Page 76a; App. G, Page 143a-145a.)

The Tax Court below found as a fact that Argo acted solely as agent of BHPP, holding record title to the properties and obtaining project financing on behalf of BHPP solely because of local usury restrictions. (App. F, Page 99a.)

The use of a nominee lacked any hint of tax-avoidance and neither the Tax Court nor the Fourth Circuit found any such motive existed. The BHPP partners did not seek any of the traditional insulating benefits (tax or otherwise) of the corporate form of doing business other than corporate exemption from usury laws. (App. F, Page 98a.) Even the purpose of the State usury laws was preserved, which essentially is to protect private citizens from being pressed into agreeing to excessive interest rates -- protection not normally needed by a business.

Accordingly, the sole purpose in using the nominee was to create a borrower who was neither an individual nor a partnership. A corporate entity satisfied this requirement, but its intrinsic corporate attributes were otherwise of no significance. As one commentator has observed:

> There is no unique feature of the corporate form that is essential to the charade. Any other silly ritual would do just as well -- say, requiring the borrower to wave a dead

chicken around his head at high noon on the courthouse steps.[3]

Absent the use of a corporate agent, however, the Biloxi Hilton Hotel would neither have been constructed nor opened for business by BHPP.

The original proposed corporate agent, Conduit, owned and recommended by MIW's attorney, was perfectly acceptable to BHPP as the entity to hold legal title to the property, and would have presented no problem under National Carbide because there was no common ownership. Argo was substituted at the last minute only at the insistence of the lender, MIW, who had an objection to Conduit's name. All parties to the transaction were fully aware that the corporation, whether it were Argo or Conduit, would be acting only as a nominee. (App. F, Pages 81a - 83a.) There was not one scintilla of difference in the nature or quality of service to be provided by Conduit and

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3. Miller, "The Nominee Conundrum: The Live Dummy Is Dead, but the Dead Dummy Should Live!", 34 Tax L.Rev. 213, 269 (1979).

the service that was actually provided by Argo. The sole relevant characteristic that makes Argo different from Conduit is the partial common ownership of Argo and its principal, BHPP; this is clearly a distinction of form without a difference in substance.

B. THE SPLIT IN THE CIRCUITS

Inconsistent decisions have been reached by various courts on facts indistinguishable from this case. In the litany of nominee cases,[4] the Federal Circuit in Raphan and the Sixth Circuit in Bollinger have found the existence of a true principal-agency relationship for tax purposes, despite common ownership. By contrast, on indistinguishable

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4. Roccaforte v. Comm'r., 77 T.C. 263 (1981), rev'd 708 F.2d 986 (5th Cir. 1983); Raphan v. United States, 3 Ct. Cl. 457 (1984), aff'd 759 F.2d 879 (Fed. Cir. 1985), cert. denied, 106 S.Ct. 129 (1985); Ourisman v. Comm'r., 82 T.C. 171 (1984), rev'd 760 F.2d 541 (4th Cir. 1985); Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984); Frink v. Comm'r, 49 T.C.M. (CCH) 386 (1984) (Appendix F), rev'd 798 F.2d 106 (4th Cir. 1986) (Appendix A); George v. Comm'r, 49 T.C.M. (CCH) 386 (1984) (Frink v. Comm'r) (Appendix F), rev'd 803 F.2d 144 (5th Cir. 1986) (Appendix C); Bollinger v. Comm'r, 48 T.C.M. (CCH) 1443 (1984) (Appendix G), aff'd No. 85-1825, December 2, 1986 (Appendix E).

facts,[5] the Fourth Circuit in Ourisman and Frink and the Fifth Circuit in Roccaforte and George have held that a valid agency relationship could not exist under any circumstances if the corporate agent is owned (in major part or whole) by its principal. By contrast, in Bollinger, in at least three of the partnerships there was a 100% identity of ownership between the corporate agent and its principals. In another of the Bollinger partnerships, there was a 67% common ownership between the principal and the corporate agent.[6]

In unequivocal terms, there exists the clearest of splits between the Circuits.[7] This condition "introduces

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5. The United States Tax Court found that Bollinger is indistinguishable from Roccaforte and Ourisman (See Bollinger, 48 T.C.M. (CCH) 1443, at 1450) (Appendix G, Page 159a). The Fourth Circuit found that Ourisman was indistinguishable from Roccaforte (See Ourisman, 760 F.2d 541, at 545). The Sixth Circuit held Bollinger to be indistinguishable from Ourisman but distinguishable from Roccaforte on its facts (See Bollinger decision, Appendix E at Page 59a). Despite the statement of the Sixth Circuit, it is respectfully submitted that the Tax Court is correct, and that all of these cases are indistinguishable on their facts.

6. See Bollinger decision, footnote 1, Apartment Complex 1, 7, and 8 for 100% common ownership, and Apartment Complex 2 for 66-2/3% common ownership (Appendix E at page 48a).

an unfortunate and unnecessary element of uncertainty in an area of our income tax laws where clear and consistent precedent is particularly helpful to both taxpayers and the tax collector."[8]

C. THE TROUBLESOME FIFTH NATIONAL CARBIDE CRITERION

In National Carbide, 336 U.S. 422 (1949), the parent corporation (the alleged principal) acquired numerous subsidiary corporations. Prior to acquisition, the acquired subsidiaries had been in the trade or business of producing chemicals and/or manufacturing related equipment. National Carbide claimed that the earned income of the subsidiaries was not separately taxable because under the agency agreement it was income of the parent. In the absence of virtually every indicia of an agency relationship, in 1938, the subsidiaries collectively owned $20 million of as-

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7. See Bollinger decision, Appendix E, Page 59a.

8. Paulsen v. Commissioner, 469 U.S. 131 (1985) (O'Connor, J., dissenting).

sets, had sales of $22 million, and earned $4.5 million. Based on an exceedingly dubious "agency" agreement, the subsidiaries reported total taxable income of $1,350 (based on a 6% return on the par value of outstanding capital stock).

By contrast, in the litany of virtually indistinguishable agency cases[9] including this case, the corporate agent of the principal partnership, had no operating history prior to its appointment as agent; held only record title and not equitable title; recorded no assets or liabilities on its books; received no working capital; had no employees; and performed no services except as a nominee.

In National Carbide, supra, the Supreme Court recited six criteria for determining whether the agent is a separate taxable entity (full quotation at pages 9 and 10 above).

The language of National Carbide is not at all inconsistent with the Tax Court's conclusion below. Criterion 5

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9. Supra, note 4.

is the only one of the six which even warrants discussion, where obviously this Court was only holding that agency factors other than mere ownership must be present to find a principal-agency relationship. All of the six National Carbide criteria must be weighed based on specific facts and circumstances to determine substantively whether a genuine agency relationship exists.

We would also think it is implicit in National Carbide that the agency relationship is suspect if it is motivated at least in substantial part as a device to avoid taxes. There is no tax avoidance motive suggested here. (See page 12 above.)

The Fourth Circuit in Ourisman and Frink, and the Fifth Circuit in Roccaforte and George, applied the fifth National Carbide criterion in unthinking and literal terms, and held that a valid agency relationship between the corporate agent and its partnership principal could not, under any circumstances, exist where the agent is owned in substantial part or whole by the principal. In so holding, however,

the Courts ignored the explicit statement in National Carbide that "[w]hat we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor."[10]

D. THE SIXTH CIRCUIT IN BOLLINGER FAULTS THE FOURTH CIRCUIT IN OURISMAN FOR MISREADING THE FIFTH NATIONAL CARBIDE CRITERION TO EXALT FORM OVER SUBSTANCE

The Sixth Circuit in Bollinger said:

> When the evidence establishes that the attributes of an agency are present, and the corporate nominee conducts itself no differently than would an independent agent which had bargained with its principal for its services at arm's length, then, even under the Fourth Circuit's "but for" test, a true principal-agent relationship has been proved.

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10. National Carbide, supra, at 437. But see Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984), particularly footnote five at page 283, which criticizes Roccaforte for its analysis of the fifth National Carbide factor.

> ... What the Supreme Court demanded was an inquiry into the actual substance of the relationship to determine if an agency existed in fact.[11]

Bollinger applied a facts and circumstances test and the fundamental axiom of substance over form to find that the holding of nominal title is the kind of task customarily undertaken by an agent. Thus, an agency relationship exists, even if the agency relationship includes the fact of common ownership and control, so long as the owned agent assumed its duties in exactly the same fashion as any other unrelated agent might have done.

Several commentators anticipated the analysis in Bollinger. In their view, the position of the Internal Revenue Service appears to place undue emphasis on stock ownership of a basically worthless nominee, and inflexible adherence to the form of that nominee holding nominal title.[12] The question of the existence of a corporate nominee

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11. Bollinger v. Commissioner, No. 85-1825 (6th Cir., December 2, 1986), Appendix E, Page 61a.

12. Miller, supra, note 3.

involves a factual determination of whether the corporate-agent is the beneficial owner of the property or is only serving as a nominal title holder for a valid non-tax related reason. The inquiry should not be directed toward whether a particular corporation should be disregarded for tax purposes based on stock ownership alone, but toward a factual determination of who beneficially owns the property in question, and then taxing the income from the property to the beneficial owner.[13]

Clearly, when the legal principles of Bollinger are applied to Frink and George, the substantive result is recognition of Argo as a mere title-holding nominee for its principal, BHPP. This is precisely the finding of the Fifth Circuit in George, and would have governed the case absent its interpretation of the fifth National Carbide factor as an absolute and mandatory prohibition of common ownership.[14]

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13. Bollinger v. Commissioner, No. 85-1825 (6th Cir., December 2, 1986)(Appendix E, Pages 60a-61a).

14. George v. Commissioner, 803 F.2d 144 at 147 (5th Cir., 1986)(Appendix C, Page 35a).

Further, the litany of nominee cases[15] is inconsistent in the significance placed on the payment of an agency fee by the principal to the nominee. The Tax Court in Bollinger held:

> Although [the agent corporation] was not compensated for services it performed, because in at least five developments the partners did not own the stock of the corporation in the same percentage as their partnership interest, we believe that the agency relationship was not based upon the partners' ownership and control of both entities.[16]

The Sixth Circuit, in affirming Bollinger, did not address the issue of a nominee fee.[17]

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15. Supra, note 4.

16. Bollinger, 48 T.C.M. (CCH) 1443 at 1451. (Appendix G, Pages 163a - 164a.)

17. See also Raphan v. United States, 759 F.2d 879 (1985), where no fee was paid, but an agency relationship was found.

By contrast, the extreme shallowness of the Fifth Circuit's analysis in George is demonstrated as follows:

> That Conduit would have charged $1,000 for the same services that Argo performed without any promise of compensation buttresses our conclusion that Yemelos did not deal at arm's length with Argo (although Argo did receive a fee of $100).[18]

BHPP undertook an $8 million construction project to build a luxury hotel on the Mississippi Gulf Coast. Whether Conduit or Argo was the agent for purposes of borrowing the money, the fact is that neither of these nominees had any material value as corporate entities, nor any reality as separate income-earning entities. Certainly, if the George decision is buttressed on the failure of BHPP to pay an additional $900 fee to a worthless nominee in an $8 million project, then its foundation is indeed flawed!

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18. George v. Commissioner, 803 F.2d 144 (5th Cir. 1986)(Emphasis added.)(Appendix C, Page 40a). See also Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986)(Appendix A, Page 11a-12a).

II. THE ISSUE IS IMPORTANT

As evidenced by the geographic disparity of the nominee cases cited herein, the uncertain tax results of a corporate nominee acting for its owner-principals is a nationwide problem. The Sixth Circuit also recognized this:

> As one might expect, the factual situation before us is not unique; it has been the subject of review by other Courts of Appeals.[19]

The effect of inconsistency and uncertainty is compounded for several reasons:

1. Lenders to partnership ventures will continue to require the use of corporate nominees to avoid various local law problems (i.e., usury, death and heirship, divorce, bankruptcy, etc.).

2. This issue becomes a partner problem involving many taxpayers in

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19. Bollinger v. Commissioner, No. 85-1825 (6th Cir., December 2, 1986)(Appendix E, Page 58a).

different geographic areas. (See, e.g., Statement of Interested Parties, page ii, supra and Appendix F, Pages 69a-71a.)

3. The amount of money involved in these cases is enormous, not only when viewed in terms of the cost of the projects ($8 million in the case of BHPP), but also in terms of the exposure to tax and interest of the individual partners (in Frink and George, estimated to be in excess of $2 million as of December 31, 1986).

4. Since the cash flow of the partnership principal is a major factor in the decision of a lender to loan money for a project, and since the income tax effect has a major influence on any cash flow projections, the ultimate failure of a venture and the concomitant default will have disastrous effects upon lending institutions, their depositors, and their investors. In principal/nominee situations,

uncertainty as to which entity will feel the tax effects will certainly lead to uncertainty in ancillary cash flow.

5. It is apparent from its decisions in Roccaforte, Ourisman, Frink, and Bollinger that the United States Tax Court is convinced that the fifth National Carbide factor should be construed reasonably, not blindly, in the determination of a true agency relationship. It is obvious that in future corporate agent cases the Tax Court will continue to find an agency relationship exists where the taxpayers reside in the Sixth Circuit or anywhere else outside of the Fourth and Fifth Circuits, but will be bound to reach an opposite result with regard to taxpayers residing within the Fourth and Fifth Circuits.[20] Thus, there is a likelihood that partners of the same partnership will be treated

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20. See Statement of Interested Parties at Pages ii-iv hereof and Appendix F at Pages 69a-71a.

differently depending solely upon their circuit of residence.

6. From a compliance and administrative viewpoint, the cost to the Internal Revenue Service of administering unclear and inconsistent precedents is highly undesirable.

It has been long-standing United States tax policy to permit and even encourage taxpayers to conduct their business affairs in the form most convenient to them. Functionally, the Internal Revenue Code should not act to impede commerce. Based on the facts and circumstances of the litany of nominee cases,[21] the partnership entity is preferable for attracting investors, but a corporation must be the nominal borrower to secure requisite financing without which the project could not be undertaken. In the existing uncertain environment, use of this structure without the risk of adverse tax con-

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21. Supra, note 4.

sequences is impossible. Because of the enormous number of taxpayers and significant dollar amounts involved, this manifest uncertainty must be eliminated.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

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